

**PROVIDER REIMBURSEMENT REVIEW BOARD
HEARING DECISION**

2000-D60

PROVIDER -

VNA of Greater Kansas City
Kansas City, Missouri

Provider No. 26-7002

vs.

INTERMEDIARY -

Blue Cross and Blue Shield Association/
Wellmark, Inc.

DATE OF HEARING-

October 26, 1999

Cost Reporting Periods Ended -
June 30, 1992, June 30, 1993 and
June 30, 1994

CASE Nos. 94-0079
95-2394
96-0287

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ISSUES:

1. Was the Intermediary's adjustment disallowing the salary and related expenses of the Director of the Volunteer Department proper?
2. Was the Intermediary's adjustment disallowing the expenses of the television recruitment advertisement proper (FY 93 only)?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

The Visiting Nurse Association of Greater Kansas City ("Provider") is a home health agency which provides skilled nursing care and related services to homebound patients throughout the eight-county metropolitan Kansas City area. It is located in Kansas City, Missouri. It filed its Medicare cost reports for the fiscal years ended June 30, 1992 ("FY 92"), June 30, 1993 ("FY 93") and June 30, 1994 ("FY 94"). For all three years the Provider claimed the costs of the director of the volunteer department. It claimed the costs of television recruitment in FY 93 only. Wellmark Inc. ("Intermediary") disallowed these costs. The Provider appealed these adjustments to the Provider Reimbursement Review Board ("Board"). The Provider's filing meets the jurisdictional requirements of 42 C.F.R. ' ' 405.1835 - .1841. The Provider is represented by Amy Jurevic Sokol, Esquire, of Shughart, Thomson & Kilroy, P.C. The Intermediary is represented by Bernard M. Talbert, Esquire, of Blue Cross and Blue Shield Association.

Issue No. 1 - Director of the Volunteer DepartmentFacts

In FYs 92, 93 and 94, the Provider employed a volunteer director whose function was to supervise its volunteers. The volunteers provided services directly to patients, not to third parties. These services were intended to assist patients in remaining in their own homes and to ultimately decrease the amount of skilled care they required. The Provider claimed costs associated with a volunteer director. In FY 92, the Provider claimed a cost of \$32,978. The Provider made an "A-5" adjustment reducing its costs on its Medicare cost report of \$28,097, under protest. The Intermediary disallowed the remaining \$4,881. The reimbursement effect was approximately \$4,000. In FY 93 the adjustment amount for the volunteer director was \$42,496. The reimbursement effect was approximately \$42,000. In FY 94 the adjustment amount was \$50,203 and the reimbursement effect was approximately \$50,000.

PROVIDER'S CONTENTIONS:

The Provider contends that according to Visiting Nurse Association of Los Angeles, Inc. v. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. Nos. 96-D2, 96-D3 and 96 D-4, November 13, 1995, Medicare and Medicaid Guide ("CCH") & 43, 904, rev'd. by HCFA Admin. Dec., January 11, 1996, CCH & 44, 027, ("VNA of LA") hospitals were reimbursed for the cost of their volunteer directors. Home health agencies are likewise reimbursed under the Medicare statute for their reasonable costs incurred in furnishing services to Medicare beneficiaries. All necessary and proper costs, those appropriate and helpful in developing and maintaining the operations of patient care facilities and activities, are considered to be reasonable and allowable costs. Regarding volunteers, their services enhance the quality of care provided to the patients. Accordingly, their costs and the costs associated with the volunteer director are incurred in furnishing services to Medicare beneficiaries, not third parties, and thus are allowable costs. Moreover, there is no prohibition against allowing volunteer director costs in hospital settings which are subject to the same regulations for Medicare reimbursement. Auditors generally allow volunteer director costs for hospitals.

The Provider argues that the costs of the volunteer director are allowable pursuant to a specific Medicare program instruction, Chapter 7 of the Provider Reimbursement Manual. The relevant portion of the Chapter states that a paid volunteer director's cost is includable in the allowable costs of a provider but is not considered under the definition of this principle. It does not state that as a condition to be allowed, the volunteers perform work that would be reimbursable under Medicare regulations. It simply states that a paid volunteer director is an allowable cost. The volunteer director is also an allowable cost pursuant to Provider Reimbursement Manual, HCFA Pub. 15-1 ("HCFA Pub. 15-1") ' 2102.2 which defines "Costs Related to Patient Care" as all necessary and proper costs which are appropriate and helpful in developing and maintaining the operations of patient facilities and activities. The salary and related expenses of a volunteer director are necessary and proper costs which are appropriate and helpful in developing and maintaining operations of patient care facilities and activities. They are necessary and proper costs related to patient care and are usually costs which are common and accepted occurrences in the field of the provider's activity. Costs related to patient care include personnel costs, administrative costs, costs of employee pension plans and normal standby costs. The salary and related expenses of a volunteer director are personnel costs. Thus, the costs are clearly related to patient care.

The Provider further argues that the costs associated with the volunteer director are nothing like the examples of "Costs Not Related to Patient Care" which include costs of meals sold to visitors, costs of drugs sold to persons other than patients, costs of operating a gift shop, costs of alcoholic beverages furnished to employees or others and costs of charitable contributions. All of these costs relate to activities of a provider that benefit persons other than a provider's patients. Conversely, the director of volunteers is concerned with coordinating recruitment, training and placement of volunteers within the Provider's offices or in the homes of its patients to better serve patients, not third parties.

The Provider contends that the costs associated with the volunteer director are allowable as administrative costs. The costs are analogous to costs associated with dietary and nutrition personnel. If dietitians or nutritionists are used to provide overall training or consultative advice to a home health agency's staff and incidentally provide dietetic or nutritional services to beneficiaries in their homes, the costs of these professional services are allowable as administrative costs even though visits performed by a dietician or nutritionist in a beneficiary's home are not separately billable.

Finally, the Provider argues that employing a volunteer director to recruit, train, and place volunteers is a prudent and cost conscious way to minimize costs, which fulfills reasonable costs and Medicare's prudent buyer principles. The volunteer director supervises the volunteers who assist patients in remaining in their own homes. This ultimately decreases the amount of skilled care the patients require and decreases the cost to the Medicare program.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the adjustment to remove the salary and related expenses of the supervisor of the Provider's volunteer department was made in accordance with Medicare Regulations at 42 C.F.R. ' 413.9 - Cost Related to Patient Care and HCFA Pub. 15-1 ' 2102.3 - Costs Not Related to Patient Care, ' 2304 - Adequacy of Cost Information. According to HCFA Pub. 15-1 ' 2102.3, costs not related to patient care are costs which are not appropriate or necessary and proper in developing and maintaining the operation of patient care facilities and activities. Costs which are not necessary include costs which usually are not common or accepted occurrences in the field of a provider's activity. Costs related to patient care could best be defined by identifying certain costs which are not considered related to patient care.

The Intermediary contends that the Provider had a brochure that explains the Volunteer Program.¹ It appears that the objective of the brochure is to recruit volunteers. A summary of the services provided by the volunteers is as follows:

1. Telephone reassurance
2. Companion escort
3. Transportation
4. Shopping assistance

¹ See Intermediary Exhibit 1-2.

5. Respite sitter service
6. Friendly visitor
7. Budgeting assistance
8. Personal care assistance
9. Chore assistance
10. Resource assistance

For those services rendered in conjunction with a visit to the patient's home, one or more of the above services may be rendered. For example, the visit by the volunteer might include companion escort, transportation, friendly visitor, etc. The above services are not covered, i.e., billed to and paid by the Medicare program nor is the cost of the services reimbursable, i.e., the cost is nonallowable in that it is not related to patient care per the Medicare program. The proper reporting of costs related to the volunteer program would be to include the costs in a nonreimbursable cost center, i.e., Medicare will not reimburse out the cost center in the Medicare cost report. In the as-filed cost report, the Provider did not report any nonreimbursable volunteer program costs.

The Intermediary further observes that in reviewing the job description for the supervisor of the volunteer department², there is little indication as to what type of service the volunteers provided. Major accountability number three of this position reads, "Makes home visits to patients and their families in order to place, monitor, and supervise volunteer arrangements". This service is not related to patient care, and the cost is not allowable. Further, two letters were received from the Provider³ which describe the main services provided by the volunteers. These services consist of visiting the patient (friendly visitor) and calling the patient (telephone reassurance services). Neither of these services are related to patient care. To the Intermediary's knowledge, the visits by the volunteers are independent of any other covered home health agency visit, such as a visit by the home health aide.

The Intermediary notes that HCFA Publication 11, ' 206.2, address the coverage issue for some of the services provided by the volunteers:

When a home health aide visits a patient to provide a health related

² See Intermediary Exhibit 1-3.

³ See Intermediary Exhibits 1-4 and 1-5.

service as discussed above, the home health aide may also perform some incidental services which do not meet the definition of a home health aide service (e.g. light cleaning, preparation of a meal, taking out the trash, shopping). However, the purpose of a home health aide visit may not be to provide these incidental services since they are not health related services, but rather are necessary household tasks that must be performed by anyone to maintain a home.

and

A physician orders home health aide visits 3 times per week. The only services provided are light housecleaning, meal preparation and trash removal. The home health aide visits cannot be covered, notwithstanding their importance to the beneficiary, because the services provided do not meet Medicare's definition of home health aide services.

Id.

The Provider takes the position that it is customary practice for home health agencies to provide volunteer services, which are not related to patient care and to include the cost of supervising that service in the Medicare cost report as an allowable cost. From the Intermediary's perspective, it is not a common and accepted occurrence in the home health agency industry to provide this type of service, not to mention including the cost of supervising this service as an allowable cost.

The Intermediary agrees with the Provider's position that a paid director of volunteers is not considered under the definition of HCFA Pub. 15-1, Chapter 7, Value of Services of Nonpaid Workers. The Provider has taken the statement from HCFA Pub. 15-1 ' 700, which states a paid director of volunteers is includable in the allowable costs of a provider as meaning no other Medicare principles of reimbursement need to be applied. There is no support in Medicare regulations and Program Instructions for this position. The personal service cost (salaries and employee benefits) of a paid director of volunteers is not automatically an allowable cost by definition, i.e., because a Program Instruction states that they are includable in the allowable costs of a provider. As is true of all costs claimed by a provider in its as-filed cost report, the costs are subject to all applicable Medicare principles of reimbursement. In the case of the personal service cost of a director of volunteers, the most important consideration/requirement is whether the personal service is related to patient care. 42 C.F.R. ' 413.9 requires all payments to providers be based on reasonable costs related to patient care. The salary and related benefits of the supervisor of the volunteer department do not benefit patient care.

The Intermediary observes in the instant case that all evidence provided to the Intermediary by the

Provider indicates that the supervisor of the volunteer department directs and supervises activity which is not related to the care of patients. The Provider has included the supervisors costs in the administrative and general ("A&G") cost center. The supervisor of volunteers did not maintain a time record of how time was spent, nor were time records maintained by the volunteers. It would not be appropriate to include the cost in the A&G cost center since there are no costs related to reimbursable activity in the Medicare cost report. The result of including these costs in A&G would be to allocate 100 percent of the cost only to reimbursable areas.

In VNA of LA, addressed above, the Administrator reversed the Board decision and ruled that the Provider's volunteer coordinator costs relating to noncovered services are not reimbursable. The nature of the expense disallowed in that case is similar to the issue in this appeal.

Issue No. 2 - Television Recruitment

Facts

Beginning in FY 92 the Provider experienced rapid growth. The Provider's volume of patient visits increased from 120,000 visits to approximately 195,000 visits. This increase represents a 63% increase in visits over a two-year time frame. To effectively treat patients, it was required to engage in a substantial amount of recruiting and hiring. Recruiting employees was especially difficult for the Provider because it is located in both Kansas and Missouri. Therefore, it needed nurses and other health care employees that were licensed in both states. The Provider required that nurses have at least one to two years of experience because they would be working unsupervised in a home setting, not in an institutional setting where they would have supervision if needed. The Provider's board of trustees, after having a committee investigate ways to be able to meet these hiring demands, decided that it would make a one-time broad based appeal to attract new employees. The Board decided to use television advertisements to meet this need for a large number of employees over a relatively short period of time. The Provider aired 118 ads on three different television stations at various times during the day. The total cost per hired employee was \$1,567 for FY 93. The national average cost for recruitment of nurses in 1992 was \$2,505.⁴

In FY 93, the Provider claimed costs associated with a series of television recruitment advertisements. The Intermediary disallowed those costs. The adjustment amount was \$125,468 and its Medicare reimbursement effect was \$124,000.

⁴ See, Central Health Services 92 Employee Recruitment and Home Office Group v. Aetna Life Insurance Company, PRRB Dec. No. 97-D44, June 25, 1997, CCH & 45,462 ("Central Health Services").

PROVIDER'S CONTENTIONS:

The Provider contends that the costs associated with the recruiting advertisement are allowable costs under HCFA Pub . 15-1 ' 2136 which covers advertising costs. The first requirement is that the costs be appropriate in developing, maintaining, and furnishing covered services to Medicare beneficiaries. HCFA Pub 15-1 ' 2136.1 provides the following as allowable advertising costs: "Costs of advertising for the purpose of recruiting medical, paramedical, administrative and clerical personnel are allowable if the personnel would be involved in patient care activities or in the development and maintenance of the facility." Id. The video was aimed at recruiting home health nurses who are clearly medical personnel and involved in patient care. The advertisement was not an effort to increase patient utilization of services. At the time the television advertisement was produced, the Provider had a shortage of home health nurses, and the television advertisement was a means to attract new home health nurses. Thus, the costs were appropriate in developing, maintaining and furnishing covered services to Medicare beneficiaries.

The second requirement is that an intermediary should consider the facts and circumstances of each provider's situation as well as the amounts that would ordinarily be paid for comparable services by comparable institutions. The Intermediary admitted that they did not consider the amounts that would ordinarily be paid for comparable services by comparable institutions. The third requirement is that such costs must be common and accepted costs in the field of the provider's activity. Television is used by the U.S. military, the Internal Revenue Service and home health agencies, to recruit personnel. In fact the PRRB in Central Health Services 92 Employee Recruitment and Home Office Group v. Aetna Life Insurance Company, PRRB Dec. No. 97-D94, June 25, 1997, CCH & 45462 ("Central Health Services") stated that there are numerous examples of using radio and television advertisement for personnel recruitment, which support the conclusion that the use of these media are common and accepted practices. The above decision held that the radio and television advertising costs of a group of home health agencies were allowable because the purpose was for personnel recruitment and not to increase patient utilization. Further, the Board decided that the expenditures on radio and television were reasonable and cost effective.

The Provider contends that it is like Central Health Services in that the advertisement portrayed a rewarding work environment and noted the benefits of working in the home health industry, not the benefits of home health care. The transcript of the videotape and the videotape itself show that the advertisement was specifically directed toward prospective employees and requested those interested in employment to contact the Provider. Further, the board of trustees of the Provider met and decided that television advertising was necessary to meet the additional demand caused by the increased volume of visits and the potential for increased turnover. The Provider had also formed a recruitment and retention committee which explored a number of measures to improve recruitment and retention. The Committee recommended several ideas to the board of trustees and it tried a number of the

recommendations.

The Provider observes that the board of trustees decided that television recruitment was the most cost effective and beneficial option to achieve its goal of recruiting a large number of quality employees. As outlined in the study,⁵ television is a more effective medium for recruitment than newspaper or radio advertisement. The Provider as a prudent and cost-conscious buyer sought to minimize the cost of the television ads. There were members of the advertisement industry and a newscaster who were on the Board who provided insight into the appropriate costs involved in the project and how to minimize those costs. Several Board Members donated services. Finally, the Provider argues that it was a prudent and cost conscious buyer in that it was well below the cost limits for every service they provided. In total, it was \$1,133,233 below the cost limits.

INTERMEDIARY'S CONTENTIONS:

The Intermediary contends that the adjustment to disallow television recruitment ads was made in accordance with HCFA Pub. 15-1 ' 2102.1 - Reasonable Costs and ' 2103 - Prudent Buyer. The Intermediary has disallowed the cost of the television recruitment ad based on the prudence of cost. The cost of recruitment would have been minimized if the Provider had used more traditional means of recruitment, such as classified ads in the newspaper. When reviewing the FY 93 recruiting expenses, the Intermediary noted an increase of \$200,640 from the prior year (\$31,344 in FY 92 to \$231,984 in FY 93). The majority of this increase relates to the \$125,468 television recruiting ad.

The Intermediary notes that the Provider claims that a more aggressive recruiting campaign was needed in FY 93 due to increased visit volume and turnover associated with its merger with Clinicare that occurred in FY 92. The Provider claims that 248 new employees were hired in the three-year period beginning July 1, 1991 and ending June 30, 1994. Assuming these employees were hired evenly over the three-year period, approximately 83 employees were hired in both FY 92 and FY 93. This means that the amount of total advertising dollars spent per new employee increased 641 % from \$377 in FY 92 to \$2,795 in FY 93.

The Intermediary observes that the Provider has submitted no evidence to support that more employees were hired after the airing of the televised ads or that the dramatic increase in spending was justified or necessary. The Provider has also not submitted evidence to support that the more traditional means of recruiting used in previous years were no longer effective. In the absence of this evidence, the Intermediary is not satisfied that the Provider exercised Medicare's prudent buyer concept in its procurement of recruitment advertising.

⁵

See Provider Exhibit P.

CITATION OF LAW, REGULATIONS AND PROGRAM INSTRUCTIONS:1. Regulations - 42 C.F.R.:

- ' ' 405.1835 - .1841 - Board Jurisdiction
- ' ' 413.9 - Cost Related to Patient Care

2. Program Instructions - Home Health Agency Manual (HCFA Pub. 11):

- ' ' 206.2 - Home Health Aides Services

3. Program Instructions - Provider Reimbursement Manual, Part I (HCFA Pub. 15-1):

- Chapter 7 - Value of Services of Nonpaid Workers
- ' ' 700 - Principle
- ' ' 2102.1 - Reasonable Costs
- ' ' 2102.2 - Costs Related to Patient Care
- ' ' 2102.3 - Costs Not Related to Patient Care
- ' ' 2103 - Prudent Buyer
- ' ' 2136 - Advertising Costs - General
- ' ' 2136.1 - Allowable Advertising Costs
- ' ' 2304 - Adequacy of Cost Information

4. Cases:

Visiting Nurse Association of Los Angeles Inc. vs. Blue Cross and Blue Shield Association/Blue Cross of California, PRRB Dec. Nos. 96-D2, 96-D3 and 96 D-4, November 13, 1995, Medicare and Medicaid Guide ("CCH") & 43, 904, rev=d, by HCFA Admin. Dec., January 11, 1996, CCH & 44,027

Central Health Services 92 Employee Recruitment and Home Office Group v. Aetna Life Insurance Company, PRRB Dec. No. 97-D94, June 25, 1997, CCH & 45, 462.

FINDINGS OF FACT, CONCLUSION OF LAW AND DISCUSSION:

The Board, after considering the law, regulations, program instructions, facts, parties= contentions and evidence submitted finds and concludes as follows.

Issue No. 1 -- Director of Volunteer Department

The Board finds that the services rendered by the director of volunteers and the volunteers are not related to patient care and are thus not allowable. The regulation at 42 C.F.R. ' 413.9 requires that for costs to be allowable, they must be related to patient care. Based on the brochure introduced as evidence, it is clear that the services provided by the volunteers are not related to patient care. Items such as telephone reassurance, companion escort and personal care assistance are personal care items, not health care related. Further, the director=s job description provides for the responsibility for directing the above activities which are not patient care related. Thus, both activities are not patient care related.

The Board notes that no services of the volunteers were or could be billed to patients. Further, there was nothing in the record to document the actual activity of volunteers. In the final analysis, the Board concludes that the volunteer services were not necessary and critical to provide patient care. In a complementary manner, the director=s activity was unnecessary in the delivery of patient care. Therefore, the costs are not allowable under 42 C.F.R. ' 413.9.

Issue No. 2 -- Television Recruitment

The Board finds the costs of television recruiting reasonable and necessary; thus, they are allowable under 42 C.F.R. ' 413.9. The Board finds television recruiting was a proper tool to seek prospective employees. The Provider=s board of directors made a conscious, considerate and measured decision to use the television ad. The Board further finds that the costs of the ad were related to patient care. They were also reasonable when compared to the national average for recruiting nurses (\$2,505 per nurses - national average versus the Provider=s average of \$1,567). Further, the Provider clearly established the need for the ad in light of the tight labor market in the area. Finally, the number of recruits increased from 115 in FY 92 to 148 in FY 93. Although this number was not significant, the other criteria above demonstrate the propriety of the Provider=s actions in attempting to increase its staff.

The Board further finds that the Intermediary did not properly apply Medicare=s prudent buyer concept.

In applying this concept, the burden of proof for establishing whether a provider was prudent in its actions is on an intermediary. The Intermediary should have made comparisons with similar providers to support its conclusion that the television ad was imprudent. No study was included in the record.

DECISION AND ORDER:

Issue No.1 - - Director of Volunteer Department

The director of volunteer activities are not related to patient care; thus, the cost of this service is not allowable. The Intermediary's adjustments are affirmed.

Issue No. 2 - - Television Recruitment

The television ad for recruiting nurses is a reasonable and necessary cost related to patient care. The Intermediary's adjustment is reversed.

Board Members Participating:

Irvin W. Kues
Henry C. Wessman, Esq.
Martin W. Hoover, Jr., Esq.
Charles R. Barker
Stanley J. Sokolove

FOR THE BOARD:

Irvin W. Kues
Chairman